

Ex Parte Comments of

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In the Matter of

Protecting and Promoting the Open Internet, GN Docket No. 14-28

Preserving the Open Internet, GN Docket 09-191

Framework for Broadband Internet Service, GN Docket 10-127

February 17, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Protecting and Promoting the Open Internet, GN Docket 14-28; Preserving the Open Internet, GN Docket 09-191; Framework for Broadband Internet Service, GN Docket 10-127

Dear Ms. Dortch:

Subsequent to my earlier filings in the above-captioned matters, I published an article last week that bears directly on the scope and nature of the agency's on-going Open Internet

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proceedings.² The article is attached as an Appendix.

The article reviews the substantial and counter-productive impact on the FCC's proceedings of what the White House explicitly refers to as "President Obama's plan".³ The President's alternative plan for regulating broadband ISPs—alternative to what the FCC proposed in its May, 2014 NPRM--goes far beyond the purported goal of enforceable net neutrality rules. It explicitly embraces instead the transformation of broadband into a public utility, one that "must carry the same obligations as so many of the other vital services do."⁴

Under the President's public utility plan, Open Internet rules are secondary (or less) to the true goal of radically restructuring the regulation of the Internet ecosystem, rejecting nearly twenty years of bi-partisan and wildly successful policies dating to the Clinton Administration that have applied only "light touch" regulation to this rapidly evolving set of technologies.

Though the reportedly 300+ page Report and Order under current consideration has not been made public, comments from Chairman Wheeler, Commissioner Pai, and others in the agency make clear that the straight-forward approach to Open Internet rules promised in the May NPRM has now been jettisoned in favor of President Obama's plan.

As the article notes, transforming the NPRM from one aimed at passing enforceable Open Internet rules to one that will implement the President's public utility plan invites many dangers, not the least of which is further regulatory expansion far beyond the contours of "net neutrality."

Even since the Chairman first announced his intention to shift this proceeding from a rulemaking based on Section 706 to a "reclassification" of broadband under Title II, for example, the scope of Title II provisions from which the agency does not initially plan to forbear has grown dramatically. In his comments at the Consumer Electronics Show in early January, the Chairman indicated that only the three "core" provisions of Title II's public utility sections—201, 202, and 208—would initially be applied to broadband Internet access services.

² Larry Downes, *How Wheeler's 'Net Neutrality' Became Obama's 'Public Utility,'* FORBES.COM, Feb. 12, 2015, available at <http://www.forbes.com/sites/larrydownes/2015/02/12/how-wheelers-net-neutrality-became-obamas-public-utility/>.

³ "Net Neutrality: President Obama's Plan for a Free and Open Internet," The White House, Nov, 10, 2014, available at www.whitehouse.gov/net-neutrality. Beyond the very title of the announcement, the White House refers repeatedly to the President's "plan," e.g. "That's why the President has laid out a plan to do it, and is asking the FCC to implement it;" "Watch President Obama explain his plan, then read his statement and forward it on;" "Share the President's Plan."

⁴ *Id.*

By the time the Chairman issued his fact sheet⁵ about the upcoming order in early February, however, those three provisions had expanded to twelve, part of an on-going process the Chairman has referred to as “modernizing” Title II.

The Chairman’s fact sheet also indicated the Report and Order would include provisions under which the FCC will, “for the first time,” grant itself the authority to police any and all “interconnection activities.”

There will, no doubt, be many more crucial policy decisions to be found embedded in the text and notes of the upcoming order.

But the process of “modernizing” legislation (or deciding not to) is the Constitutional duty of Congress, not the Chairman of an independent regulatory agency.

While the Chairman’s goal of supporting the President’s plan may have been undertaken with only good intentions, proceeding down this path is certain to invite protracted, complex, and--as the Chairman himself made clear in May and throughout the months leading up to the White House’s decision to intervene--entirely unnecessary litigation.

Beyond the legal risks and uncertainties inherent in adopting President Obama’s alternative plan, the effort to transform the Internet into a public utility poses severe unintended negative consequences on future investment in infrastructure. It unnecessarily risks derailing the remarkable engine of innovation that has characterized the Internet ecosystem since its emergence as what those of us in Silicon Valley know as a “Big Bang Disruption.”⁶

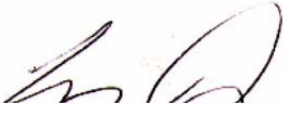
That danger alone argues persuasively for a return to a more reasoned and legally-secure approach.

I once again strongly urge the Commission to step back from the brink, and let cooler heads among the agency’s expert staff bring these proceedings back to reality.

⁵ Fact Sheet, *Chairman Wheeler Proposes New Rules for Protecting the Open Internet*, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0204/DOC-331869A1.pdf.

⁶ See Larry Downes and Paul Nunes, *BIG BANG DISRUPTION: STRATEGY IN THE AGE OF DEVASTATING INNOVATION* (Portfolio 2014).

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'L. Downes', with a stylized, flowing script.

Larry Downes, Project Director
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Attachment

Appendix

Forbes

[Larry Downes](#) Contributor

[Tech](#) 2/12/2015 @ 5:00AM 7,331 views

How Wheeler's "Net Neutrality" Became Obama's "Public Utility"

In the lead-up to the FCC's Feb. 26th vote on new net neutrality rules (the agency's third effort in a decade), the debate over the legal, technical, and economic consequences of having the agency anoint itself to police broadband network management practices has descended into the surreal, complete [with stranger-than-fiction details](#) of a shadow FCC operating within the White House, staffed by lobbyists for large Internet content companies.

But if there was ever any doubt about what this campaign was really about, it should now be abundantly clear that its true goal was never to enact rules that preserve the open Internet.

For over a decade, it's been obvious at least in Washington that the populist rhetoric around net neutrality was [merely a useful wedge to drive the true objective](#)—the transformation of Internet access into an unbundled, rate-regulated public utility, with ISPs large and small treated as quasi-public agencies, much like water, power, and gas companies.

Or, more to the point, like the former telephone monopoly, whose rates, services, and business practices were tightly controlled for decades by a combination of FCC and state public utility commissions.

Controlled, that is, until the free and open Internet, left almost entirely on its own to establish rules based not on politics but on engineering, overwhelmed the slow-moving regulated telcos on price, technology, flexibility and service.

The wireline telephone utilities [have almost no customers left](#), and have been hemorrhaging money for years. Like the railroads, their main objective now is to get regulators to let them go out of business in an orderly fashion, transferring what remains of their usable assets and legacy consumers to better, faster, and cheaper broadband services, on which voice is just another app.

With sad irony, the rules that helped kill the switched telephone business, known as Title II, are precisely the ones the advocates have been trying since the 1990's to apply to the Internet. And

now, thanks to last-minute lobbying by the President, it seems a majority of FCC Commissioners have decided to cave in, attempting to “reclassify” broadband as a telephone service in the legal equivalent of a Hail Mary pass.

As the end-game approaches, consumers who were duped into believing they had been mobilized to fight for Internet freedom have been cast to the curb.

And the dwindling number of Internet “edge” companies cheerleading (and funding) the efforts of advocacy groups to put “strong” rules in place are beginning to see the profound danger of inviting the government to exercise unchecked authority in an ecosystem that has grown exponentially and evolved quickly with limited federal oversight.

In December, sixty leading tech companies including Qualcomm, IBM, and Cisco, [urged the FCC not to pursue the Title II approach](#). And Google, which was a strong voice in favor of regulation during the 2010 reboot of this morality play, has stayed out of it this time, [except to lobby for its own interests](#) in deploying fiber networks.

President Obama’s Blindside

No matter. As an FCC rulemaking dissolved into chaos last year thanks in large part to misinformation [promoted by Netflix and embraced by comedian John Oliver](#), the advocates, with strong influence inside the White House and at the FCC, showed their hand late last year—not that there was ever much doubt about the cards they were holding.

Under the title, “President Obama’s Plan for a Free and Open Internet,” the White House in November [blindsided the on-going FCC proceeding](#) by proposing an alternative plan that would transform the Internet into a public utility.

“The time has come for the FCC to recognize that broadband service is of the same importance and must carry the same obligations as so many of the other vital services do,” the President announced in proposing his own plan, one that would explicitly transform broadband into a public utility.

FCC Chairman Tom Wheeler, appointed by Obama in 2013, [abruptly flip-flopped](#), ditching a more narrow rulemaking initiated in May that followed a legal course charted by a D.C. court earlier in the year.

The May proposal made clear the Chairman saw no need to rely on Title II to achieve the goals the President reiterated. “My preference has been to follow the roadmap laid out by the D.C. Circuit in the belief that it was the fastest and best way to get protections in place,” [Wheeler wrote](#) in announcing his plan.

But the Obama plan has instead prevailed. And so confident are the pro-Title II forces that they

have [now dropped all pretense](#) that the public utility hammer was merely an unfortunate but necessary means to the end of shoring up the Internet with a modest net neutrality nail.

Reclassification, according to the President's plan, "is a basic acknowledgment of the services ISPs provide to American homes and businesses, and the straightforward obligations necessary to ensure the network works for everyone."

This is no longer a campaign for rules that would (to use the FCC's term) "prophylactically" ban future network management practices, including website blocking and other forms of anti-competitive discrimination. (Which were and always have been illegal, in any case, under antitrust and anti-competition law actively enforced by the Federal Trade Commission—that is, until Title II goes into effect and explicitly removes the FTC's authority.)

This is now a plan that will, if it passes legal muster, regulate every inch of the Internet's infrastructure, from content providers to consumers and every node along the way. For better but much more likely for worse.

Let me be clear about my preferences. Like everyone else, I have always supported the principles of the free and open Internet, as I've made clear in four books on the disruptive potential of innovation that takes place without the permission of platform operators or government regulators. Faster and cheaper "Big Bang Disruptions," as I explain [in my recently co-authored book](#), rely on open standards, robust fixed and mobile networks, and unfettered access to all consumers.

And while I've been skeptical at best about the FCC's authority or ability to enforce rules that the market has, up until now, done an extremely efficient and rapid job of enforcing itself, I supported the alternative of actual legislation from Congress that neatly and efficiently closes any potential gaps.

A bill introduced in both the House and Senate early in January [enacts precisely the rules the Obama plan calls for](#), and resolves any doubt about the FCC's legal authority.

But since it also takes off the table any future effort to force-fit 21st century technologies into 20th century public utility law, the advocates dismissed it without any discussion. The White House, according to sources in Congress, has put pressure on Democrats not to engage in revising the bill.

What's in the FCC's Obama Plan?

What alternative has the White House and the FCC cooked up? We don't yet know the specifics of the FCC's implementation of the Obama plan. Adhering to longstanding practice, Chairman Wheeler has refused to make the proposal public until after the vote, though he did [issue a brief overview](#) that described the broad strokes of the Obama plan. (Two cheers for transparency.)

We know, for example, that the Report and Order that was circulated last week by the Chairman to the other four Commissioners (two Republican, two Democrat) is over 300 pages long.

The rules themselves are reported to be only eight pages. But as with the 2010 version, the all-important details on what the agency means by key terms such as “reasonable network management” and “unreasonable discrimination” (along with new terms such as “paid prioritization,” “throttling,” and the kitchen sink of legal arguments supporting this radical shift in policy), will be buried in the report and its footnotes.

([My testimony before a House Committee](#) attempting to parse the much shorter 2010 Report and Order was itself forty-six pages long.)

We also know that as the agency positions itself to implement the new public utility regime called for by the White House, Chairman Wheeler has repeatedly fallen victim to the kind of regulatory mission creep that should worry consumers and content providers alike.

While emphatically claiming throughout last year, for example, that peering and interconnection “is not a net neutrality issue” because it does not involve the last mile between ISPs and consumers, the Chairman’s new proposal gives the agency “broad authority” over all “interconnection activities.”

If, according to Wheeler’s overview, the agency determines that any back-end traffic management agreement is not “just and reasonable,” the FCC will “for the first time” be empowered to “take appropriate enforcement action.” (Today, [according to the OECD](#), over 99% of such agreements are so simple they aren’t even reduced to a written agreement.)

So as the FCC prepares to vote on the Obama plan, the entire Internet ecosystem seems poised to be swept into the cold dead hands of Title II, including mobile broadband, interconnection, content delivery networks, co-located servers, peering, transit, backhaul and backbones. To the extent content providers use such services to get high-bandwidth video and other traffic to their customers, they too will likely be subject to FCC oversight.

And just how much of Title II that will be applied is also growing at a remarkable pace. At the annual Consumer Electronics Show in early January, where Wheeler first revealed his flip flop on Title II, the Chairman reassured the audience that only a small subset of the full public utility book was to be thrown at broadband.

Mobile voice, he pointed out, had long been subjected to three sections of Title II, which hadn’t seemed to slow deployment of mobile services. (Wheeler then and since, however, has conveniently left out that while mobile *voice* services, which make up a small fraction of mobile traffic, are subject to limited Title II regulation, mobile *data* never has been and, under the law, cannot be—one of many legal hurdles the new rules will face.)

Those three provisions, in any case, are what Wheeler admits form the “core” of Title II’s public utility authority, requiring regulated providers to offer “just and reasonable” rates and services to

all customers, with the FCC empowered to define those terms and adjudicate a wide range of complaints.

But in applying Title II to the entire Internet, Wheeler told the CES audience, its other provisions would be ignored under a complex legal process known as forbearance.

That approach, [specifically called for in the Obama plan](#), reflected a significant scaling back of an earlier failed effort to apply Title II to broadband during the last iteration of the net neutrality debate in 2010.

At the time, former FCC Chairman Julius Genachowski, facing similar pressure from public utility advocates, [offered what he called a “third way”](#) to enact Open Internet rules, relying for authority on Title II but forbearing from all but six provisions. These included the three “core” sections mentioned at CES by Wheeler, plus three more that dealt with universal service fees, privacy, and access rules for consumers with disabilities.

Back then, when cooler heads prevailed, [a bi-partisan majority of both the House and the Senate](#) strongly urged Genachowski to steer clear of Title II. (Internet policy, starting with the Clinton Administration, has largely been a non-partisan issue, at least until now.) The “third way” plan was dropped.

Last week, however, when Chairman Wheeler promised to “modernize” Title II in implementing the Obama plan, his more limited application of Title II suddenly mushroomed, in less than a month, [from three provisions to twelve](#).

The added sections provide “partial application” of Universal Service to broadband, fold in several enforcement provisions, and apply rules for attaching equipment to existing utility poles and conduits under terms and conditions approved by regulators.

And while the Chairman was adamant that the Obama plan would not include rate regulation, unbundling requirements, or any new fees or taxes, Republican FCC Commissioner Ajit Pai challenged that view at a press conference on Tuesday.

Pai, one of the few people who has actually seen the full 332-page document, said that under the Chairman’s proposal, ex post rate regulation was allowed any time the FCC found the broadband market was not sufficiently competitive—a finding the agency has made repeatedly.

For example, in its annual report on broadband deployment published last week, the FCC cynically changed [the definition of broadband speed from 4 Mbps to 25 Mbps](#), leading to the not surprising finding that broadband deployment, especially to rural Americans, is not “reasonable and timely,” the trigger for the FCC to take more aggressive regulatory action according to the agency’s view of the law.

Commissioner Pai identified several other worrisome aspects of Wheeler’s effort to enact the Obama plan:

- Sponsored data and zero rated services will likely be prohibited, [as public utility advocates have demanded](#). These are innovative and well-regarded services where content providers subsidize consumer use of the most popular applications (including Facebook and Wikipedia) on mobile plans.
- Usage-based pricing may also be banned, meaning average users will subsidize power users who consume far more broadband services.
- Class actions lawsuits will be allowed for challenges to ISP practices, a perennial Christmas gift for Washington trial lawyers.
- Forbearance from rate regulation, unbundling, and new taxes and fees is only temporary. No future utility-style regulations has been taken off the table.

No surprise the FCC's other Republican Commissioner, Michael O'Rielly, [characterized the Chairman's reassurances](#) of limited Title II public utility rules as "fauxbearance."

A Dangerous Exercise In Political Theater

Even in the best case scenario, the Obama plan will generate years of uncertainty—for consumers, for the agency, for content providers and for ISPs. That is perhaps the most significant factor weighing in favor of waiting for the Congressional alternative to proceed, and for Democrats to collaborate rather than simply condemn it.

Or to do nothing at all, and wait to see what kinds of network management abuses actually emerge before trying to figure out where new laws are needed to curb them.

Instead, it seems almost certain now that the FCC will proceed with its legally fraught plan to rewrite Clinton-era laws that kept broadband Internet from being subjected to public utility regulation.

With the voices of reason shouted down, we will instead have to wait for the convoluted administrative processes that follow. The FCC will vote on the new rules on Feb. 26th, then begin the steps necessary to get them published in the Federal Register. With the 2010 rulemaking, the FCC's most recent effort, that effort took almost a year.

Then of course, as Chairman Wheeler readily admits, multiple legal challenges will certainly follow. (Aspects of Title II, [notes former FCC Commissioner Robert McDowell](#), has been litigated in court 2,600 times, and at the FCC over 25,000 times.)

The advocates, as last time, will cynically file suit themselves in hopes of directing the case to a friendlier federal court than the D.C. Circuit, which has slapped the agency down repeatedly when its reach exceeded its legal grasp, including twice rejecting the FCC's efforts to extend its limited jurisdiction over broadband.

In any event, count on a year or longer of legal proceedings, by which time there will almost certainly be a new FCC Chairman, and possibly a different party in the White House. Which could render much of this effort moot.

Until the next time.

Enacting the Obama plan, as both the White House and the FCC surely know, could in the end amount to little more than political theater. But win or lose, the public utility gambit risks the continued expansion of the Internet economy for short-term partisan gain, making it that much harder in the future to solve legitimate regulatory problems that do arise in the fast-changing Internet ecosystem.

In the rush to support the President Obama's political agenda, all reasonable alternatives and common-sense considerations have been thrown out the executive floor windows at FCC headquarters, which is, by law, supposed to be independent of political or other influence from the White House.

Well, perhaps the advocates are right. Perhaps a majority of Internet consumers would prefer a return to the high prices and slow pace of investment and service innovation that characterized life in the age of a regulated telephone monopoly.

But if so, they should at least be relieved of any illusion that this has not been and remains the true goal of those who are now boldly calling for public utility regulation as an end in itself.

Or that independent regulatory agencies, staffed by experts in the industries they oversee but run by political appointees, can be effectively immunized from partisan tampering.

My new book, co-authored with Paul Nunes, is “[Big Bang Disruption: Strategy in the Age of Devastating Innovation](#)” (Portfolio 2014). Follow me on [Twitter](#) and [Facebook](#) for more on the accident-prone intersection of technology and policy.